IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1120

ANTHONY MAGGIO, CARL IPPOLITO, GUGHELIMO CICCONE, and BARTHOLOMEW DiNOLA,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HAROLD SIMANDL,
Attorney for and of Counsel with Petitioners.

ANTHONY A. CALANDRA,
on the Brief.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

I.

Summary Statement of the Matter Involved.

1. On December 18th, 1940, an indictment containing five counts was filed in the United States District Court for the District of New Jersey, charging the petitioners and others with unlawfully engaging in the business of distillers, possessing an unregistered still, failing to give

notice of the still, fermenting mash fit for distillation in an unauthorized distillery and conspiring to violate the Internal Revenue laws relating to stills (R. 21 to 27).

2. Several of the defendants having previously pleaded guilty and a severance having been granted as to others, the case proceeded to trial against the petitioners.

3. After the government rested its case petitioner Ippolito made a timely motion for a directed verdict of acquittal since the evidence at that time was wholly insufficient to take his case to the jury (R. 399). The motion was denied and the trial continued as to him and the others. Compelled by the Court's decision to defend himself against the unproved charges Ippolito testified on his own behalf (R. 490, *et seq.*). After several further days of trial and when Ippolito was about to rest his defense the trial court, over his objection (R. 536), permitted the government to reopen its case and permitted one Bematre, who had pleaded guilty at a prior trial, to testify (R. 536, 563). We concede that Bematre's testimony implicated Ippolito in the offenses charged in the indictment. We submit that without doubt, because of the absence of Bematre's testimony when the motion was properly made, Ippolito was entitled to have been acquitted.

4. The District Attorney, directing Bematre's attention to an incident unrelated to the charges which occurred to him personally, deliberately elicited testimony that Bematre had been attacked and robbed by two men, one of whom was the petitioner DiNola. A motion for a mistrial was denied (R. 576) although it was obvious from the nature of the questions that this testimony was designedly introduced by the District Attorney.

5. Mrs. Hahn, a government witness, was asked if she could identify any of the men present in the court room as having been patrons during January and February, 1940, in the Trenton restaurant in which she worked. She could not identify any of the four defendants but identified Bematre and another. Under the guise of surprise and although the testimony thus given had not been in aid of the petitioners, the United States Attorney was given leave to recall her to the stand after a brief cross examination, to cross examine her for the purpose of impeaching her and of neutralizing her testimony (R. 184, 186). She had made a statement in May, 1940, three months after the raid which led to the indictment, in which rogues gallery pictures of individuals were referred to. She had also testified at a prior trial, which ended in a mistrial through no fault of the petitioners, at which time she failed to identify any of the petitioners as patrons of her restaurant and was permitted to leave the stand without having the statement of May, 1940 called to her attention. The day before she testified in the instant case she had told an investigator who was aiding the United States Attorney that she could not identify any of the petitioners and that she intended to adhere to her testimony given at the former trial. Under the pretext of surprise and pretending to neutralize her testimony the District Attorney placed before the jury her hearsay statement that petitioner Maggio and three others were known as the "Big 4" (R. 188), a term implying that those named were arch criminals and underworld characters and that petitioner Ippolito was an associate of the sinister "Big 4" (R. 190). He was thus also able to bring before the jury her statement which mentioned the rogues gallery photograph of Ippolito and "identification numbers" contained thereon (R. 190). It may be said that Ippolito had no prior convictions. A por-

tion of the statement, read in the presence of the jury, related that a person who was identified from a police photograph, was an associate of the "Big 4" (R. 190). While an objection to a reading of this latter portion was later sustained, although overruled at first, the damage had been done.

It is apparent from the fact that Mrs. Hahn was called to testify on a subject matter which had no real significance in the case that the real purpose of the District Attorney in returning her to the witness stand and in cross examining her was to arouse the passions of the jurors by blackening the characters of the petitioners. At other times throughout the trial the District Attorney made a studied effort to have the jury believe that the petitioners were of bad character and therefore likely to commit the offenses with which they were then charged.

6. When the witness Lamantia was leaving the stand the District Attorney sought permission to make an application for his arrest (R. 649). The Court declined to entertain it at that time but despite this, and in the presence of the jury, the witness was arrested by one Glassman, an investigator of the Alcohol Tax Unit (R. 650). Counsel moved for a mistrial because the arrest of Lamantia in the presence of the jury would tend to prejudice the jury against the defendants, but the motion was denied and the jury were instructed to disregard the incident (R. 649, 650). Counsel sought to prove through Glassman that he had in fact placed Lamantia under arrest in the court room, but an objection to the testimony was sustained (R. 651, 652).

7. The jury returned its verdict of guilty on all five counts against all of the defendants (the petitioners) then

on trial. Each of the petitioners was then sentenced to serve three years in a penitentiary, to pay fines and to stand committed until the fines were paid (R. 14-16).

8. Petitioners appealed from the judgments to the United States Circuit Court of Appeals for the Third Circuit. On January 30th, 1942 the judgments were affirmed upon an opinion concurred in by the three judges who had heard oral argument (R. 720). A petition for rehearing was then duly filed and on March 4th, 1942, an order was entered denying the rehearing and withdrawing a portion of the original opinion and substituting in place thereof a new opinion. On this occasion all five judges of the Court constituted the Court (R. 745). The order was the first indication to the petitioners that their case had been considered and acted upon by judges other than those who had originally heard their argument on appeal and considered their case.

II.

Questions Presented.

The questions presented are:

1. Whether a defendant in a criminal case is compelled to testify against himself in violation of the Fifth Amendment to the Constitution, by court action, which compels him to proceed with his defense, despite the absence of sufficient proof to take his case to the jury at the end of the government's case.

2. Is the right of a defendant to freely elect whether or not to testify in his own behalf, as safeguarded by the

Act of March 16, 1878, 20 Stat. at L. 30, c. 37 now 28 U. S. C. A. 632, invaded by action of the trial court in improperly denying a motion for a directed verdict made after the government announces it has no further evidence to offer?

3. Whether in view of the duty of the courts to safeguard the privilege, rights and protection afforded to defendants by the Fifth Amendment to the Constitution and the aforementioned statute, an appellate court in passing upon the trial court's action in denying a motion for a directed verdict is confined to the evidence as it stood at the time the motion was properly made.

4. Whether in a close case the deliberate introduction by the District Attorney of testimony of an unrelated attack and armed robbery alleged to have been committed by a defendant is such prejudicial error as to result in a reversal although the jury is perfunctorily told to disregard such testimony.

5. Whether in a close case a District Attorney may designedly pretend surprise for the purpose of influencing the minds of the jury by placing before it hearsay statements depicting the defendants as criminals and associates of criminals.

6. Whether a District Attorney may plead surprise, knowing in advance of calling the witness that she has already under oath affirmed certain facts and has informed him that she will adhere to her prior sworn testimony and where the witness, prior to the plea of surprise, has testified as the District Attorney must have anticipated.

7. Whether a District Attorney may plead surprise knowing that the witness at a prior trial has previously

testified and insists on testifying in accordance with the testimony given by her.

8. Whether a case argued before and decided by an appellate court consisting of three judges may be later re-decided without oral argument by a court consisting of five judges.

III.

Statutes Involved.

The statutes and rules of court involved are printed in the appendix.

IV.

Statement of the Case.

In the evening of February 24th, 1940, premises on Cuyler Avenue, Trenton, New Jersey, were visited by the local police who seized bags of sugar and empty five gallon cans. On the morning of February 25th, 1940 premises known as 1060 Revere Avenue, Trenton, were raided and an unregistered still, mash and alcohol were taken by the police.

When the government rested its case there was no evidence connecting petitioner Ippolito with the offenses charged in the indictment. The only evidence which had been offered against him was that for some weeks prior to the raid he was seen on occasion in his home and public restaurants in the company of some of the defendants, but on none of those occasions on the raided premises or its vicinity. Since association is not proof of crime Ippolito's motion for a directed verdict, made at the end of the government's case, was improperly denied.

The evidence then offered in defense by Ippolito was a complete denial of any interest or participation in the illegal enterprise. It appears that Ippolito was and had been a resident of Trenton and for a long time had occupied a building in Trenton, on one floor of which he ran a clothing store, his wife conducted a beauty parlor, and on another floor of which was located their living quarters (R. 490). Four or five days after the aforementioned motion for a directed verdict had been made, and while the defendants' case was being presented as we have already shown, Bematre was permitted, over objection, to testify and connected Ippolito with the charges in the indictment.

The evidence against Maggio was, as found by the court below, largely circumstantial. Bematre, who had testified that he knew all about the still and its construction, completely exculpated Maggio, saying that the latter had no interest therein (R. 580, 581).

The testimony against DiNola was that he was acquainted with some of the defendants and was present when Ciccone, on the morning of February 25th, is alleged to have offered a bribe to a police officer to remove the other police from the Revere Avenue address for a few hours. The evidence offered against Ciccone other than Bematre's testimony was the testimony of one Lamantia who said that Ciccone had offered him a job, and after the raid told him that he wanted Lamantia to work at the raided premises. Later in the trial he testified that it was Bematre, not Ciccone, who had offered him the job. There was also testimony that Ciccone offered a bribe to a police officer to remove the police who were conducting the raid.

During the course of the trial government counsel, by direct and unambiguous questions asked of Bematre, elicited testimony that he had been attacked and robbed by

DiNola and another. Although the court below said that this testimony was not responsive and was unsolicited by the United States Attorney (R. 728), it is clear that the court below is in error. Bematre had described a meeting in a boarding house after some of the petitioners and others had returned to that place a second time (R. 575). After stating that an agreement had been made the witness was asked:

> "Q. Did anything happen to *you?* A. Yes.
> Q. What? A. It wasn't that day.
> Q. Well, when was it? A. *You mean to me, myself, personally?*
> Q. *Yes.* A. Well, night time when I was sleeping * * * when I was sleeping there, from my recollection that I can recognize, to be sure, it was Merino and Bucky (DiNola.)
> Q. What happened to *you?* A. *They come in the room and robbed me of what money I had"* (A., p. 575). (Italics ours.)

After Bematre was briefly cross examined with respect to this testimony (R. 610, 638), the District Attorney on re-direct examination proceeded to lead the witness through a recital of the intimate details of the robbery (R. 639). The witness thus testified that petitioner DiNola and Merino entered the room where he was sleeping, and with two drawn guns ordered him to "get up". In DiNola's presence Merino made him stand against the wall and searched the bed and took $97.00 out of the pillow case. Merino then hit him over the head with the gun and warned him not to mention the still or the robbery (R. 640).

The District Attorney also brought to the attention of the jury highly prejudicial testimony immaterial to the issues in the following manner. Mrs. Hahn, called merely to testify that some of the defendants had been seen by

her together in a restaurant in which she worked, had failed to identify any of the petitioners as patrons of that restaurant. At a prior trial, which ended in a mistrial, she had identified two persons then in the court room as patrons and had been permitted to leave the stand at that time without any reference to a statement previously made by her in May, 1940 (R. 184). In that statement she had, by the use of police photographs shown to her, mentioned several of the petitioners as patrons, but the day before her testimony in the instant trial had advised an investigator attached to the United States Attorney's office in the preparation of his case that she was positive in her identification of two of the men (none of them being the petitioners) but was not positive of the others (R. 192). She indicated clearly that she intended to adhere to her testimony given at a prior trial (R. 192). By questioning her further for the ostensible purpose of neutralizing her testimony, although the defendants consented that her testimony be stricken and the witness be withdrawn (R. 186), the District Attorney brought before the jury the hearsay statements attributed to her but denied as having been made by her, that Maggio and three others were known as the "Big 4" and that Ippolito had a police record and was an associate of the sinister "Big 4" (R. 188, 191).

One Lamantia, who had testified for the government and then was called as a witness by the defendants, was arrested in the presence of the jury by an investigator of the Alcohol Tax Unit. To prove the arrest counsel called the investigator but objections to questions addressed to him by the defendants were sustained (R. 651, 652). The court below refused to consider whether such arrest was to the prejudice of the defendants, for which a mistrial should have been declared, giving as its reason that the arrest, if it did occur, took place outside the presence of the

jury (R. 728). When, by their petition for rehearing, petitioners again demonstrated that from the offer of evidence it was clear that the arrest was in the presence of the jury, the court amended its opinion. On this occasion, however, five judges participated, although only three had originally heard the oral argument and considered the case. In effect two judges who had not heard the argument or participated in the original decision were effective in redeciding the case without calling for a reargument.

V.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals decided that the action of the trial court in erroneously denying Ippolito and DiNola's motions for directed verdicts, when the government rested its case announcing that it had no further evidence to offer against the defendants, was not an invasion of the defendants' rights guaranteed by the Fifth Amendment to the Constitution, and safeguarded as well by the Act of March 16th, 1878, 20 Stat. at L. 30, chap. 37, 28 U. S. C. 632. It held that the government's case is not closed until all of its evidence introduced at any stage of the trial is in, that the resting of its case is only an intermediate stage of the government's case and that accordingly in considering whether a motion for a directed verdict should have been granted the Court was not confined to the evidence as it stood at the time the motion was properly made.

The decision of the court below conflicts with the principles laid down by this Court in *Bruno* v. *United States*, 308 U. S. 287, that the right of a defendant to freely choose

whether or not to testify may not be invaded or interfered with in any degree by the trial court.

In giving consideration to evidence offered after the government rested its case, and with the aid of such testimony, ruling that a motion for a directed verdict previously made was thereby properly denied, the court below sanctioned the compulsion complained of because it failed to distinguish between motions for directed verdicts made in civil and criminal cases. In criminal cases effect must be given to the right of a person charged with crime not to be compelled to prove his innocence or testify until the government has made a case against him, for to do otherwise would be to compel an accused to convict himself. *State* v. *Bacheller,* 89 N. J. Law 433; *State* v. *Pruser,* 127 N. J. Law 97.

2. The Circuit Court of Appeals decided that the trial court properly refused to grant a motion for a mistrial made because a witness testified to an unrelated attack and armed robbery alleged to have been committed on him by a defendant, saying that such testimony was unsolicited by the United States Attorney and not responsive to his questions. It reached its conclusion although it is obvious that such testimony was deliberately introduced by the District Attorney.

In so deciding the court below failed to follow the principle announced by this Court in *Berger* v. *United States,* 295 U. S. 78, and other representative decisions such as *National Labor Relations Board* vs. *Air Associates,* 121 Fed. (2d) 586, and *United States* v. *Perlstein,* 120 Fed. (2d) 276, that the right to a fair trial is a civil right of "peculiar sacredness", guaranteed by the Constitution, the invasion of which through the misconduct of the District Attorney, particularly in a close case, is reversible error.

3. The Circuit Court of Appeals held that the reading by the District Attorney of a hearsay statement depicting the petitioners as criminals and associates of criminals, alleged to have been made by the witness Hahn, was proper to refresh the recollection of the witness, although the District Attorney's stated purpose was to neutralize negative testimony given by her, on the plea of surprise when in fact he obviously was not surprised.

The decision in this respect conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Young* v. *United States*, 97 Fed. (2d) 200, and the decision of the FIFTH Circuit in the case of *Sneed* v. *United States*, 298 Fed. 911, that a witness whose testimony the offeror knows in advance will be adverse may not be offered in order to get before the jury contradictory statements which are prejudicial and damaging hearsay. The decision is also in conflict with the principle announced by this Court in the case of *Socony Vacuum Oil Co.* vs. *U. S.*, 310 U. S. 150, that reversible error is committed by the deliberate use of refreshing material for purposes not material to the issues but to arouse the passions of the jurors.

4. After decision by three judges who originally heard argument, the case was redecided without further oral argument or a request therefor by five judges. We may safely assume that this action of the Court was prompted by its decision that the case was either exceptional or that there was a difference in view among the judges on a question of fundamental importance. It is also likely that in the instant case two of the three judges who had heard argument may have had a view contrary to that of the other three judges of the Court. See *Commissioner of Internal Revenue* v. *Textile Mills Securities Corporation*, 117 Fed. (2d) 62, 71, and *Oughton* v. *National Labor Relations*

Board, 118 Fed. (2d) 486, 494. Yet despite these reasons which prompted the Court to sit *en banc* and redecide the case, it did not call for a reargument.

It is submitted that by this action the court below has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Wherefore your petitioners pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit; commanding the said Court to certify and send to this Court for its review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments herein of the Circuit Court of Appeals may be reversed and that petitioners may have such other and further relief in the premises as this Court may deem appropriate.

ANTHONY MAGGIO,
CARL IPPOLITO,
GUGHELIMO CICCONE,
BARTHOLOMEW DINOLA,

By HAROLD SIMANDL,
Attorney for and of Counsel with
Petitioners.

Certificate.

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THE UNITED STATES OF AMERICA,
Respondent.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

I hereby certify that I have examined the foregoing Petition for a Writ of Certiorari and that in my opinion it is well founded and the case is one in which the petition should be granted.

HAROLD SIMANDL,
Attorney for and of Counsel with
Petitioners.